Score Option Sdn Bhd & Anor v Duar Tuan Kiat & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-2127 OF 2011
SULONG MATJERAIE, MOHD HISHAMUDIN AND ABDUL WAHAB PATAIL JJCA
19 DECEMBER 2012

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Civil Procedure — Writ of summons — Commencement of action — Want of authority — Setting aside — Appeal against — Writ bore names of companies but action brought by directors without consent of receivers and managers — Whether appellants had locus standi to commence action — Whether writ unsustainable for want of authority to commence action — Whether jurisdiction to strike out claim ought to be under O 18 r 19 or O 12 r 7 of the Rules of the High Court 1980 — Whether objection ought to have been taken in High Court

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Company Law — Receivers and managers — Scope of duties — Conduct legal proceedings — Directors commenced proceedings on behalf of company against third party — Whether directors had locus standi to commence action — Whether directors interfered with functions of receivers and managers

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The appellants appealed against the decision of the High Court in allowing with costs the first and second respondent's application to set aside the appellants' writ pursuant to O 12 r 7 of the Rules of the High Court 1980 ('RHC') and dismissed the appellants' summons for interlocutory injunction, inter alia, to restrain the first, second and third respondents from certain actions. It was submitted by the appellants that the issues raised whether the High Court had the jurisdiction to strike out the appellants' claim under O 12 r 7 of the RHC for want of locus standi, and in any event, whether the appellants had the locus standi to commence the action. In this case, although the writ bore the names of the companies as appellants/plaintiffs, it was an action by the directors without the consent of the receivers and managers who had been appointed. The action sought to be commenced under the writ stems from the directors' disagreement with the action of the receivers and managers to sell the companies' charged property to the fourth respondent on the grounds that the companies' problems with the third respondent resulted from the breach by the fourth respondent of a joint venture agreement with the companies before the receivers and managers were appointed.

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Held, dismissing the appeal with costs:

(1) Once receivers and managers have been appointed, directors no longer

have authority over the company or to act on behalf of the company. Since an action could interfere with the functions of the receivers and managers, as well as impact upon the assets of the company, the consent of the receiver and manager is necessary if the directors seek to conduct legal proceedings on behalf of the company against a third party. The directors have residual authority to take action against the receiver and manager, the party appointing the receiver and manager for any misconduct or if the appointment of receiver and manager is contested (see para 5).

(2) It is incumbent upon a party to set out the intitulements in clear and unambiguous terms and not leave it to the court to make a preference. But neither before the High Court nor in this court was there any application to amend the intitulements. The action remained, as evident from the writ, purporting to be by the companies. Since it was neither commenced by the companies' receivers and managers, nor by the directors with the receivers' and managers' consent, the intitulement was all wrong (see para 8).

(3) The action sought to be commenced under the writ was not a bona fide action against the actions of the receivers and managers but an interference with the functions of the receivers and managers and does not fall within the category of actions which the directors of the companies may commence without consent. Since it was not properly commenced, the action and the present appeal were described as maintained by the directors of the companies (see para 9).

(4) The writ was obviously unsustainable for the reason that the directors did not have the authority to commence the writ action. That being so, there was no practical purpose in reinstating the writ found to have been commenced without authority and which had already been struck off. In decision the order to be made, a court must take into consideration whether the order made would bring the particular issue before it to a conclusion (see para 17).

(5) Although the issue whether the respondents ought to have applied under O 18 r 19 or O 12 r 7 is a legal question, it was purely procedural and not substantive. Since the purpose of procedural rules is to facilitate expeditious and economical resolution of legal proceedings, the objection ought to have been taken in the High Court. Where it had not been taken and the application had proceeded to a conclusion in the High Court, it was a fit and proper case that the directors be estopped from relying upon it at the appeal stage (see para 17).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan Mahkamah Tinggi yang membenarkan dengan kos permohonan responden pertama dan kedua untuk

mengenepikan writ perayu di bawah A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan menolak saman injunksi interlokutori, antara lain, untuk menghalang responden pertama, kedua dan ketiga daripada tindakan-tindakan tertentu. Adalah dikemukakan oleh perayu bahawa isu-isu yang dibangkitkan adalah sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membatalkan tuntutan perayu di bawah A 12 k 7 KMT kerana tiada locus standi, dan dalam apa jua keadaan, sama ada perayu-perayu mempunyai locus standi untuk memulakan tindakan. Dalam kes ini, walaupun writ menzahirkan nama-nama syarikat-syarikat sebagai perayu/plaintif, ia adalah satu tindakan oleh pengarah-pengarah tanpa persetujuan penerima-penerima dan pengurus-pengurus yang dilantik. Tindakan yang ingin dimulakan di bawah writ adalah berdasarkan ketidaksetujuan pengarah-pengarah dengan tindakan penerima-penerima dan pengurus-pengurus untuk menjual harta syarikat-syarikat yang dicajkan kepada responden keempat atas alasan bahawa masalah syarikat-syarikat dengan responden ketiga disebabkan oleh pelanggaran perjanjian usaha sama dengan syarikat-syarikat oleh responden keempat, sebelum penerima dan pengurus dilantik.

Diputuskan, menolak rayuan dengan kos:

(1) Apabila penerima-penerima dan pengurus-pengurus telah dilantik, pengarah-pengarah tidak lagi mempunyai kuasa ke atas syarikat atau untuk bertindak bagi pihak syarikat. Oleh kerana tindakan boleh mengganggu fungsi-fungsi penerima-penerima dan pengurus-pengurus, dan juga mempunyai kesan ke atas aset-aset syarikat, persetujuan penerima dan pengurus adalah perlu sekiranya pengarah ingin menjalankan prosiding undang-undang bagi pihak syarikat tersebut terhadap pihak ketiga. Pengarah-pengarah mempunyai kuasa baki untuk mengambil tindakan terhadap penerima dan pengurus, pihak yang melantik penerima dan pengurus, bagi mana-mana salah laku atau jika pelantikan penerima dan pengurus dipertikaikan (lihat perenggan 5).

(2) Adalah wajib bagi sesuatu pihak untuk menyatakan 'intitulements' dalam terma yang jelas dan dan tidak kabur dan tidak menyerahkan kepada mahkamah untuk membuat pilihan. Namun tidak di hadapan Mahkamah Tinggi atau di mahkamah ini terdapatnya apa-apa permohonan untuk meminda 'intitulements'. Tindakan ini kekal, seperti yang terbukti melalui writ, yang seolah-olah dibuat oleh syarikat. Oleh kerana ia tidak dimulakan oleh syarikat-syarikat penerima-penerima dan pengurus-pengurus, atau oleh para pengarah dengan persetujuan penerima-penerima dan pengurus-pengurus, 'intitulement' adalah kesemuanya silap (lihat perenggan 8).

(3) Tindakan yang hendak dimulakan di bawah writ tersebut bukan satu tindakan bona fide terhadap tindakan-tindakan penerima-penerima dan

pengurus-pengurus tetapi merupakan campur tangan fungsi-fungsi penerima-penerima dan pengurus-pengurus dan tidak terjumlah dalam kategori tindakan yang pengarah-pengarah syarikat-syarikat boleh mulakan tanpa kebenaran. Oleh kerana ia tidak dimulakan dengan betul, tindakan dan rayuan ini telah digambarkan sebagai dikekalkan oleh pengarah-pengarah syarikat-syarikat (lihat perenggan 9).

(4) Writ tersebut jelas tidak mapan atas alasan bahawa pengarah-pengarah tersebut tidak mempunyai kuasa untuk memulakan tindakan writ tersebut. Oleh itu, tiada tujuan praktikal dalam mengembalikan writ yang didapati telah dimulakan tanpa kuasa dan yang telah pun dibatalkan. Dalam keputusan perintah yang hendak dibuat, mahkamah perlu mengambil kira sama ada perintah yang dibuat akan membawa isu di hadapannya kepada kesimpulan (lihat perenggan 17).

(5) Walaupun isu sama ada responden sepatutnya memohon di bawah A 18 k 19 atau A 12 k 7 adalah persoalan undang-undang, ia adalah semata-mata prosedur dan tidak substantif. Oleh kerana tujuan peraturan prosedur adalah untuk memudahkan penyelesaian prosiding undang-undang dengan segera dan secara ekonomi, bantahan tersebut sepatutnya dibuat di Mahkamah Tinggi. Di mana ia tidak dibuat dan permohonan tersebut diteruskan kepada kesimpulan di Mahkamah Tinggi, ia adalah kes yang layak dan sesuai bahawa pengarah diestop daripada bersandarkan kepadanya di peringkat rayuan (lihat perenggan 17).]

Notes

For a case on commencement of action, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) para 9595.

For a case on scope of duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 689.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551, CA (refd)

Newhart Development Ltd v Co-operative Commercial Bank Ltd [1978] 2 All ER 896, CA (refd)

Tudor Grange Holdings Ltd and Others v Citibank NA and Another [1991] 4 All ER 1, Ch D (refd)

Legislation referred to

Rules of the High Court 1980 O 12 r 7, O 18 r 19

Appeal from: Civil Suit No 22 NCVC-224 of 2011 (High Court, Kuala Lumpur)

MR Kumar (Hiu Yeat Fong with him) (Vaasan & Chandran) for the appellants.
TM Eng (Clestina Chin with him) (Jal & Lim) for the first and second respondents.
SY Ng (Brian Sim with him) (Raja Darryl & Loh) for the third respondent.
CL Wong (Skrine) for the fourth respondent.

Abdul Wahab Patail JCA:

[1] The appeal before us appears as appeals by Score Option Sdn Bhd and Austral Development Sdn Bhd against the decision on 13 July 2011 where the Kuala Lumpur High Court:

(a) allowed with costs the first and second defendants' application to set aside the plaintiffs' writ pursuant to O 12 r 7 of the Rules of the High Court 1980 ('RHC 1980'); and

(b) dismissed the plaintiffs' summons for interlocutory injunction, inter alia, to restrain the first, second and third defendants from certain actions.

[2] It was submitted for Score Option Sdn Bhd and Austral Development Sdn Bhd that the issues raised are whether the High Court has the jurisdiction to strike out the appellants'/plaintiffs' claim under O 12 r 7 of the RHC for want of locus standi, and in any event, whether the appellants/plaintiffs have the locus standi to commence the action.

[3] We address the second issue first.

[4] The learned judge in the High Court had drawn a clear distinction between Score Option Sdn Bhd and Austral Development Sdn Bhd as companies ('the companies') and their directors. She had done so because although the writ bore the names of the companies as plaintiffs, it was an action by the directors without the consent of the receivers and managers who had been appointed.

THE LAW

[5] The effect of an appointment of a receiver stems from the object of obtaining the appointment of a receiver that is to place the assets of the company under the protection of the court, and to prevent everybody except the receiver, as an officer of the court, from in any way intermeddling with them. A manager is appointed when it is desired not merely to protect the assets, but also to carry on a trade or business to protect the goodwill since a receiver has no power to carry on the business. Once receivers and managers have been appointed, directors no longer have authority over the company or

to act on behalf of the company. Since an action could interfere with the functions of the receivers and managers, as well as impact upon the assets of the company, the consent of the receiver and manager is necessary if the directors seek to conduct legal proceedings on behalf of the company against a third party. See *Newhart Development Ltd v Co-operative Commercial Bank Ltd* [1978] 2 All ER 896.

[6] The directors have residual authority to take action against the receiver and manager, the party appointing the receiver and manager for any misconduct or if the appointment of receiver and manager is contested. See *Tudor Grange Holdings Ltd and Others v Citibank NA and Another* [1991] 4 All ER 1.

THE WRIT OF SUMMONS

[7] It is first necessary to examine what the writ of summons is about.

[8] A perusal of the writ shows that the named plaintiffs are the companies themselves and not the directors on behalf of the companies. Now, if a writ of summons is commenced by the company against a third party, the writ will be intituled as such. If it is commenced by the directors of the company against a third party, the intitulement will reflect that. If, as in this case, the action is commenced by the directors against the receivers and managers of the company to challenge the actions of the receivers and managers, it would be intituled as an action by the directors of the company against the receivers and managers, the party who appointed them and any third party involved. It is incumbent upon a party to set out the intitulements in clear and unambiguous terms and not leave it to the court to make a preference. But neither before the High Court nor in this court was there any application to amend the intitulements. The action remains, as evident from the writ, purporting to be by the companies. Since it was neither commenced by the companies' receivers and managers, nor by the directors with the receivers' and managers' consent, the intitulement is all wrong. The effect of a wrong intitulement is illustrated in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551 (CA).

[9] The action sought to be commenced under the writ stems from the directors' disagreement with the action of the receivers and managers to sell the companies' charged property to the fourth respondent on the grounds that the companies' problems with the third respondent resulted from the breach by the fourth respondent of a joint venture agreement dated 22 August 2002 with the companies before the receivers and managers were appointed. The basis of objection has nothing to do with the propriety or otherwise of their actions as the receivers and managers of the companies to realise the security for the third

respondent. It is not a challenge as to the appointment of the receivers and managers themselves or of any impropriety on their part. We agree with the learned judge, that the action is not a bona fide action against the actions of the receivers and managers but an interference with the functions of the receivers and managers and does not fall within the category of actions which the directors of the companies may commence without consent.

[10] Since it was not properly commenced, we describe the action and the present appeal as maintained by the directors of the companies.

ORDER 12 R 7 OR O 18 R 19 OF THE RULES OF THE HIGH COURT

[11] We now address the first issue.

[12] Order 12 r 7 provides:

> 7. Application to set aside writ, etc. (0. 12 r. 7)
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> (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering appearance, apply to the Court for an order setting aside the writ or the service of the writ, or notice of the writ, on him, or declaring that the writ or notice has been duly served on him or discharging any order giving leave to serve the notice on him out of jurisdiction.
>
> (2) An application under this rule must be made by summons.

[13] Counsel MR Kumar, for the directors of the companies, submitted that the respondents' application in encl 13 in the High Court was defective. It was submitted that the application to set aside the directors' writ of summons ought to have been made under O 18 r 19 of the RHC and not O 12 r 7. His reasoning is that the first and second respondents are not questioning the jurisdiction of the High Court to hear the plaintiffs' writ, but are saying that the claim filed by the companies' directors are obviously unsustainable because they are not clothed with authority to institute the action because receivers and managers had been appointed over the companies.

[14] The latter part of the submission that the assertion of lack of locus standi effectively means the companies' directors' writ is obvious unsustainable is founded upon the following:

> The question that immediately comes to our minds is if the defendants are sure in their own minds that the plaintiffs have no locus standi or cause of action why did they not invoke O 18 r 19 or O 33 r 2 of the Rules of the High Court 1980 (RHC) because if they succeed in their applications on any one of these orders the civil suit

and the injunction itself would both collapse. We would demonstrate why invocation of O 18 r 19 or O 33 r 2 is the correct procedure by reference to authority (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sev Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (SC)) and

We are unanimously of the view that both the High Court and the Court of Appeal adopted the wrong approach to an O 18 r 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply cannot stand and, therefore it falls under the category of a case which is obviously unsustainable (*Lembaga Kumpulan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja* [2000] 3 MLJ 65; [2000] 3 CLJ 81 (FC)).

[15] In this case, the grounds given for the application by the respondents are:

(a) *plaintif pertama dan plaintif kedua merupakan syarikat-syarikat dalam penerimaan dan pengurusan, di mana penerima dan pengurus telah pun dilantik bagi plaintif pertama dan plaintif kedua pada 29 Januari 2010;*

(b) *pengarah-pengarah di dalam plaintif pertama dan plaintif kedua tidak mempunyai locus standi untuk memfailkan tindakan ini memandangkan mereka telah gagal untuk memenuhi segala syarat-syarat yang perlu untuk membolehkan mereka memulakan tindakan ini terhadap defendan pertama dan kedua, sebagai penerima dan pengurus plaintif pertama dan plaintif kedua; dan*

(c) *oleh itu, writ saman ini difailkan secara salah dan patut diketepikan.*

[16] In our view, while counsel is correct that the application in encl 13 effectively says that the writ commenced by the directors is obviously unsustainable, we are now confronted by an error upon an error, and have to make a choice between:

(a) striking out encl 13 with the result that the writ commenced by the directors without authority become reinstated; and

(b) maintaining the striking out of the writ.

[17] The choice ceases to be a conundrum when it is observed that the first alternative, being pursued by the directors, flows from the reasoning that the writ ought to be struck out through O 18 r 19 and not O 12 r 7, that the writ is obviously unsustainable for the reason the directors did not have the authority to commence the writ action. That being so, there is no practical purpose in reinstating the writ found to have been commenced without authority and which had already been struck off. In decision the order to be made, a court must take into consideration whether the order made to bring the particular issue before it to a conclusion. Furthermore, even though

whether the respondents ought to have applied under O 18 r 19 or O 12 r 7 is a legal question, it is purely procedural and not substantive. Since the purpose of procedural rules are to facilitate expeditious and economical resolution of legal proceedings. The objection ought to have been taken in the High Court, and where it had not been taken and the application had proceeded to a conclusion in the High Court, in our view it is a fit and proper case that the directors be estopped from relying upon it at the appeal stage.

[18] Accordingly, we dismissed the appeal in respect of the decision on encl 13. It follows that the appeal on encl 4 is also dismissed. We ordered that the costs be paid by the directors.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed